UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VIRGINIE GSCHWIND, in her own right and administratrix of the estate of Cyril Gschwind and Alexandra Gschwind,	:	
Plaintiff - Appellant,	:	No. 99-3329
vs.	:	
CESSNA AIRCRAFT COMPANY; PRATT & WHITNEY CANADA, INC.,	:	
Defendants - Appellees.	:	

Appeal from the United States
District Court
For the District of Kansas
(D.C. No. 96-CV-1269-MLB)

Catherine B. Slavin, Wolk & Genter, Philadelphia, Pennsylvania, for Plaintiff Appellant.

John C. Nettels, Jr. (and Thomas E. Nanney, Morrison & Hecker, L.L.P., Kansas City, Missouri, with him on the briefs), Morrison & Hecker, L.L.P., Wichita, Kansas, for Defendant - Appellee Cessna Aircraft Company.

John W. Cowden, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, Missouri, for Defendant—Appellee Pratt & Whitney Canada, Inc.

Before KELLY, ANDERSON, and HENRY, *Circuit Judges.*
KELLY, *Circuit Judge.*

Plaintiff-Appellant Virginie Gschwind appeals from the district court's denial of her Fed. R. Civ. P. 60(b)(4) motion for relief from a judgment dismissing an earlier action on forum non conveniens grounds. Our jurisdiction arises under 28 U.S.C. § 1291, and we AFFIRM.

Background

Ms. Gschwind, a citizen of Belgium, brought a wrongful death and survival action in Ohio state court against The Cessna Aircraft Company ("Cessna"), a Kansas citizen, Pratt & Whitney, a Canadian citizen, and Hartzell Propeller, Inc. ("Hartzell"), an Ohio citizen.[1] The action was then removed to the Southern District of Ohio over Ms. Gschwind's objection. She sought remand, arguing that 28 U.S.C. § 1441(b) prohibited removal because Hartzell was an Ohio citizen. In initially ordering remand to state court on this basis, the district court concluded that "[s]ince Plaintiff is a foreign national, a resident of Belgium, there is complete diversity of citizenship among the parties and the federal courts would have subject matter jurisdiction originally." Aplt. App. at 128. Upon reconsideration, the district court determined that Hartzell was fraudulently joined and denied Ms. Gschwind's motion to remand, implicitly relying upon diversity jurisdiction. After removal, the action was transferred to the District of Kansas where Hartzell was dismissed as a party and the district court conditionally granted a forum non conveniens dismissal. *Id.* at 55-85.

On appeal, we affirmed the forum non conveniens dismissal. Ms. Gschwind then petitioned for rehearing and rehearing en banc, arguing for the first time that the district court lacked diversity jurisdiction over suits between aliens. *Id.* at 173-77, 328-29. We denied the petition. *Id.* at 201-02. She then filed a petition for a writ of certiorari with the Supreme Court, again arguing lack of subject matter jurisdiction. *Id.* at 203-25. The petition was denied.

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1. Cessna and Pratt & Whitney are the Defendant-Appellees as Hartzell was dismissed as a party by the District Court of Kansas.

Ms. Gschwind next returned to federal district court and filed a Rule 60(b)(4) motion for relief from judgment, arguing that the district court's order was void for lack of subject matter jurisdiction. *Gschwind v. Cessna Aircraft Co.*, 189 F.R.D. 643 (D. Kan. 1999). The district court disagreed, concluding that while it may have erroneously assumed jurisdiction, it did not usurp its authority in interpreting the jurisdiction statute. *Id.* at 649. Accordingly, the district court concluded that the judgment may have been erroneous, but was not void. *Id.* The district court therefore concluded that the judgment could not be attacked by a Rule 60(b)(4) motion because the case was no longer pending, as required by Tenth Circuit precedent. *Id.*

The court reviewed three cases–*Wilmer v. Board of County Commissioners of Leavenworth County*, 69 F.3d 406, 409-10 (10th Cir. 1995), *Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 464 (10th Cir. 1990), and *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982)—in which the Tenth Circuit allowed subject matter jurisdiction to be attacked after appeal. In distinguishing those cases, the court noted that the "appellate court had *remanded* the case to the district court and *then* the district court considered subject matter jurisdiction pursuant to a Rule 60(b)(4) motion." *Id.* at 648 (emphasis in original). By way of contrast, in this case "the Tenth Circuit *affirmed* this court's dismissal of the case. The Tenth Circuit *denied* plaintiff's motion for rehearing. The United States Supreme Court *denied* plaintiff's petition for writ of certiorari. Unlike the cases mentioned above, the case was never remanded to the district court and at this point the case is no longer pending." *Id.* (emphasis in original).

The court found an unreported district court decision to be persuasive. *See SBKC Service Corp. v. I I I I Prospect Partners, L.P.*, No. 95-2540-JWL, 1998 WL 928408 (D. Kan. Oct. 30, 1998). In *SBKC*, the plaintiff, like Ms. Gschwind, moved to void the district court's judgment for lack of diversity jurisdiction after exhausting its appellate remedies. *Id.* at *1. The

district court denied the motion, concluding that the plaintiff's failure to contest jurisdiction on direct appeal was fatal. *Id.* at *4.

The district court also concluded that its exercise of jurisdiction was not a usurpation of authority, presumably because the defendant's residence was subject to bona fide dispute.

The district court in this action then concluded: "It follows that a Rule 60(b)(4) motion . . . cannot be used by plaintiff who did not succeed on her argument concerning subject matter jurisdiction during the appellate process. *Gschwind* 189 F.R.D. at 649.

Discussion

We review the district court's denial of Ms. Gschwind's Rule 60(b)(4) motion de novo. *Wilmer,* 69 F.3d at 409; *King Fisher Marine Service, Inc. v. 21st Phoenix Corp.,* 893 F.2d 1155, 1158 (10th Cir. 1990). A district court has

> original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a). On its face, § 1332(a) does not vest the district court with jurisdiction over actions between parties only of foreign citizenship. § 1332(a)(3) does, however, permit foreign citizens to be a party to an action between citizens of different states. § 1332(a)(3) could not have been a basis for jurisdiction in this action, however, because the action was not between citizens of different states. Ms. Gschwind, a foreign citizen, was the lone plaintiff. Therefore, the district court could have exercised jurisdiction pursuant only to § 1332(a)(2), if at all. While the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on

both sides of an action between foreign citizens, *Franceskin v. Credit Suisse,* 214 F.3d 253, 258 (2d Cir. 2000); *Faysound Ltd. v. United Coconut Chemicals. Inc.,* 878 F.2d 290, 295 (9th Cir. 1989); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.,* 874 F.2d 283, 290-91 (5th Cir. 1989); *Eze v. Yellow Cab Co. of Alexandria Virginia , Inc ,* 782 F.2d 1064, 1065 (D.C. Cir. 1986), *Ed & Fred, lnc. v. Puritan Marine Ins. Underwriters Corp.,* 506 F.2d 757, 758 (5th Cir. 1975); MOORE'S FEDERAL PRACTICE § 102.77, at 143-44 (3d ed. 1997), we concur with Judge Posner's observation that this interpretation is far from apparent from the face of 28 U.S.C. § 1332(a)(2). *See Allendale Mutual Ins. Co. v. Bull Data Sys.. Inc.,* 10 F.3d 425, 428 (7th Cir. 1993) ("Exactly what sense all this makes rather eludes us."). Nevertheless, the Defendants assume for the sake of argument that the requirements of § 1332(a)(2) were not satisfied because Ms. Gschwind was not joined by a United States citizen. Aplee. Br. (Pratt & Whitney) at 5; Aplee. Br. (Cessna) at 21. We make this same assumption inasmuch as the district court's views on jurisdiction are not dispositive to our analysis.

Rule 60(b) provides in part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: . . .(4) the judgment is void." Fed. R. Civ. P. 60(b)(4) (2000). "Rule 60(b)(4). . .is not subject to any time limitation." *Orner v. Shalala,* 30 F.3d 1307, 1310 (10th Cir. 1994) (internal quotations and citations omitted).

A judgment is void for Rule 60(b)(4) purposes if the "rendering court was powerless to enter it." *V.T.A., Inc. v. Arco, Inc.,* 597 F.2d 220, 224 (10th Cir. 1979). A judgment may in some instances be void for lack of subject matter jurisdiction. *E.g. . id.; In re Four Seasons Securities Laws Litigation,* 502 F.2d 834, 842 (10th Cir. 1974). "However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.* 624 F.2d 822, 825 (8th Cir. 1980) (citations omitted); *accord Nemaizer v. Baker* 793 F.2d 58, 65 (2d Cir. 1986) (observing that collateral attack is permitted under Rule

60(b)(4) where there is "a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction") (citations omitted).

A court does not usurp its power when it erroneously exercises jurisdiction. *Kansas City Southern,* 624 F.2d at 825. "Since federal courts have 'jurisdiction to determine jurisdiction,' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue by the court,' error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Id.* (quoting *Stoll v. Gottlieb,* 305 U.S. 165, 171 (1938)); *see also Lubben v. Selective Serv. Sys. Local Board No. 27.,* 453 F.2d 645, 649 1st Cir. 1972) ("While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction.") (footnote omitted). There must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer,* 793 F.2d at 65.

Applying these principles, we hold that the district court's judgment was not void for lack of subject matter jurisdiction. The Ohio federal district court concluded that "[s]ince Plaintiff is a foreign national, a resident of Belgium, there is complete diversity of citizenship among the parties and the federal courts would have subject matter jurisdiction originally." Aplt. App. at 128. In doing so, the district court erroneously interpreted § 1332(a). However, an erroneous interpretation of a jurisdictional statute does not render the underlying judgment void. *Stoll,* 305 U.S. at 171-72; *Kansas City Southern,* 624 F.2d at 825. Moreover, there was at least an arguable basis for jurisdiction, *cf. Nemaizer,* 793 F.2d at 65, because the scope of the district court's jurisdiction over a case with foreign parties on both sides of an action is far from clear from the face of the statute. The express language of § 1332(a)(2) does not require a United States citizen on both sides of an action between foreign citizens. The requirement only begins to become vaguely apparent when (a)(2) is read together with (a)(3) and even then it is not absolutely clear. *Allendale* 10 F.3d at 428.

Ms. Gschwind argues that the district court mischaracterized its exercise of jurisdiction as quasi-jurisdictional, i.e., that jurisdiction was premised upon the finding of jurisdictional facts. Ms. Gschwind argues that the district court instead exercised jurisdiction upon a general finding of jurisdiction over cases between a foreign citizen and a foreign and United States citizen and that this exercise of jurisdiction rendered the underlying judgment void. Aplt. Brief at 16. Ms. Gschwind correctly observes that the district court's jurisdiction was not based upon quasi-jurisdictional facts. The citizenship of the parties was not in dispute. But this is not dispositive. As we explained, an "error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Kansas City Southern,* 624 F.2d at 825.

Ms. Gschwind also asserts that the district court impermissibly extended its jurisdiction in ordering the forum non conveniens dismissal. Aplt. Br. at 17. Ms. Gschwind relies upon a distinction drawn in MOORE'S FEDERAL PRACTICE between the exercise of jurisdiction over an entire category of cases over which the court does not have jurisdiction (e.g., cases on interlocutory appeal) and the erroneous exercise of jurisdiction over a particular case that falls within a category of cases over which a court generally does have jurisdiction (e.g., diversity cases). *Id.* (quoting MOORE'S FEDERAL PRACTICE 3D § 60.44[2][a-b] (3d 1997) ("[A] lack of subject matter jurisdiction means a court's lack of jurisdiction over an entire category of cases, not whether the court makes a proper or improper determination of subject-matter jurisdiction in a particular case."). Ms. Gschwind argues that the district court in this case exercised jurisdiction over an entire category of cases over which it lacked jurisdiction: cases brought by a foreign citizen against a foreign citizen and a United States citizen. Aplt. Br. at 16; Aplt. Reply Br. at 3.

Assuming this approach is appropriate in distinguishing void, as opposed to voidable, judgments, we disagree with Ms. Gschwind's characterization of the district court's decision. The district court did not exercise jurisdiction over an entire category of cases over which it lacked jurisdiction. The district

court had jurisdiction over cases between diverse parties and assumed that the parties before it satisfied the requirements of 28 U.S.C. § 1332. It did nothing more than erroneously exercise its diversity jurisdiction in this particular case.

Finally, Ms. Gschwind asserts that the Supreme Court's decision in *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), requires the conclusion that the district court's judgment was void. Aplt. Reply Br. at 5. In *Vallely,* the district court entertained involuntary bankruptcy proceedings against an insurance company. At the time, the Bankruptcy Act expressly provided that insurance companies were not subject to the district court's bankruptcy jurisdiction. *Vallely,* 254 U.S. at 351-52. The district court entered judgment and the time for appeal lapsed, at which time the insurance company contested jurisdiction by filing a motion to vacate the judgment. *Id.* at 351. The Court held that "[c]ourts are constituted by authority and they cannot [act] beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities." *Id.* at 353. The Court distinguished the case from those in which the exercise of jurisdiction was held to be merely erroneous. "[In those cases] the courts had jurisdiction of their subject-matter and necessarily power to pass upon the fact (diversity of citizenship) upon which that jurisdiction depended in the given case. The subject-matter of the suit was not withheld from them by explicit provision of the law which was their sole warrant of power." *Id.* at 354. Because the jurisdictional statute in question clearly excluded insurance companies from jurisdiction, the Court concluded that there was "no power in the District Court to include them . . . For a court to extend the act to corporations of either kind is to enact a law, not to execute one." *Id.* at 355-56.

Vallely is distinguishable. While the jurisdictional statute in *Vallely* plainly excluded insurance companies from jurisdiction, § 1332 does not on its face exclude actions brought by a foreign citizen against a foreign and United States citizen. Thus, unlike the district court's actions in *Vallely,* the district

court's exercise of jurisdiction in this instance does not amount to a total usurpation or extension of jurisdiction.

In light of our holding that the district court's judgment was not void, we need not address whether Ms. Gschwind was barred from attacking subject matter jurisdiction on principles of res judicata.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VIRGINIE GSCHWIND, *Plaintiff,*	:	CIVIL ACTION
v.	:	No. 96-1269-MLB
CESSNA AIRCRAFT COMPANY, et al., *Defendants*	:	

MEMORANDUM AND ORDER

This matter comes before the court on plaintiff Virginie Gschwind's motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140). For the reasons set forth below, plaintiff's motion is denied.

I. HISTORY OF THIS CASE

On August 11, 1995, plaintiff, a citizen of Belgium, filed a wrongful death action in the Court of Common Pleas in Montgomery County, Ohio, against defendants, claiming damages for the death of her husband, Cyril Gschwind. Cyril Gschwind, a French national residing in Belgium at the time of his death, was killed in a Cessna aircraft near Cannes, France. The named defendants included Cessna Aircraft Company, a Kansas Corporation with its principal place of business in Kansas, Pratt & Whitney Canada, a Canadian corporation with its principal place of business in Canada, and Hartzell Propeller, Inc., an Ohio corporation with its principal place of business in Ohio.

Subsequently, Cessna removed the action to the United States District Court for the Southern District of Ohio asserting diversity jurisdiction under 28 U.S.C. § 1332. Cessna then moved to dismiss the complaint on the grounds of *forum non conveniens* or, in the alternative, a transfer to the District of Kansas (Doc. 7). Gschwind moved the district court to remand

(Doc. 9). Gschwind, however, did not argue that the district court lacked diversity jurisdiction under 28 U.S.C § 1332. Instead, she conceded in her memorandum in support of her motion that "there is complete diversity of citizenship." (Doc. 145, Ex. A at 2). Although initially the motion was granted, the district court ultimately denied plaintiff's motion (Doc. 35). The district court then granted Cessna's motion to transfer venue and the action was transferred to this court (Doc. 81).

On March 20, 1997, this court conditionally dismissed plaintiff's action on the grounds of *forum non conveniens* (Doc. 125). After defendants filed affidavits agreeing to the court-ordered conditions, the court entered an order of dismissal (Doc. 130). Final judgment was entered on May 8, 1997 (Doc. 131).

Plaintiff appealed to the United States Court of Appeals for the Tenth Circuit arguing against the dismissal of her action for *forum non conveniens.* The Tenth Circuit affirmed. *See Gschwind v. Cessna Aircraft Co.,* 161 F.3d 602, 610 (10th Cir. 1998), *cert. denied,* ____ *U.S.* ____, 119 S. Ct. 1755 (1999).

Subsequently, plaintiff filed a motion for rehearing or rehearing en banc and for the first time argued that this court had no diversity jurisdiction over the action.[1] On November 10, 1998, the Tenth Circuit issued, without opinion, an order denying plaintiff's motion. Plaintiff filed a petition for writ of certiorari to the United States Supreme Court. In her petition, plaintiff once again claimed this court lacked subject matter jurisdiction under the diversity statute. The United States

1. Plaintiff argued that complete diversity did not exist because a " 'citizen[] or subject of a foreign state' (Gschwind) has sued a 'citizen[] of a State" (Cessna) and a "citizen[] or subject of a foreign state "(Pratt & Whitney Canada)[.] . . . [T]he presence of an alien on both sides of the action destroys diversity." *Plaintiff's Petition for Rehearing and Suggestion for Rehearing in Banc* at 2 (citing *Faysound Ltd. v. United Coconut Chemicals Inc.,* 878 F.2d 290, 295 (9th Cir. 1989) in which the court found no diversity jurisdiction in an action involving a Hong Kong plaintiff against a Swiss defendant and a New York defendant). Defendants do not, in their replies to plaintiff's motion, contest plaintiff's proposition that this court lacked subject matter jurisdiction.

Supreme Court denied the petition. *See Gschwind v. Cessna Aircraft Co.*, ____ *U.S.* ____, 119 S. Ct. 1755 (1999).

Now, plaintiff has returned to this court and filed a motion to vacate the court's previous order pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140). Plaintiff argues that because this court never had diversity jurisdiction over the action, it was without power to dismiss the action. This court's judgment, the plaintiff continues, is therefore void and must be vacated. As will be explained below, however, once the United States Supreme Court denied plaintiff's writ of certiorari, the issue of subject matter jurisdiction became res judicata and cannot be collaterally attacked.

II. RULE 60(b)(4)

Rule 60(b) of the Federal Rules of Civil Procedure provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . ." Fed. R. Civ. P. Rule 60(b)(4). Voidness is usually found for lack of either subject matter jurisdiction or personal jurisdiction. *See V. T. A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). A mere erroneous judgment will not be found to be void and it must be determined that the rendering court was powerless to enter the judgment, plainly usurped its power, or acted in a manner inconsistent with due process of law. *See id* at 224-25. Although a motion for relief under 60(b)(4) is subject to a "reasonable" time limitation, if the judgment is found to be void, any 60(b)(4) motion will be considered filed within a reasonable time. *See id.* at 224 & n.9. The Tenth Circuit has stated that "[i]n the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted." *Id.* at 225.

Indeed, it is this conflict between the need for finality of the judgment and the need for validity of the judgment which is at the heart of a Rule 60(b)(4) motion. The comments to the Restatement discuss the conflict:

The problem poses a sharp conflict of basic policies. The principle of finality has its strongest justification where the

parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, the principles of finality and validity cannot be perfectly accommodated. Questions of subject matter jurisdiction must be justiciable if the legal rules governing competency are to be given effect; some tribunal must determine them, either the court in which the action is commenced or some other court of referral. If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised.

Restatement (Second) of Judgments § 12 cmt. a (1982) . The modern approach is to give the finality of final judgments greater weight. *See id.*

III. VALID VERSUS ERRONEOUS JUDGMENTS

The court agrees with plaintiff that if the court did not have subject matter jurisdiction over the action pursuant to diversity jurisdiction under 28 U.S.C. § 1332, then its dismissal of the plaintiff's case with conditions on grounds of *forum non conveniens* was an erroneous exercise of jurisdiction. *See Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 504 (1947) ("Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."); *In re Papandreou,* 139 F.3d 247, 255-56 & n.6 (D.C. Cir. 1998) (specifically excepting conditional *forum non conveniens* dismissals from dismissals on other non-merits grounds which are allowed in the absence of the rendering court's subject matter jurisdiction). An erroneous judgment, however, does not render it a nullity, justifying plaintiff's collateral attack.

The United States Supreme Court has examined the meaning of void judgments. *See Chicot County Draniage District v. Baxter State Bank,* 308 U.S. 371 (1940). In *Chicot,* jurisdiction was based on a statute which was subsequently determined to be unconstitutional in an unrelated case. *See id.* at 373-74. The defendant in the original case argued that the subsequent finding that the statute was unconstitutional operated to void the judgment of the district court. *See id.* at 376. The Court disagreed:

> The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

Id. The Court continued by citing an earlier Supreme Court opinion in which the petitioner alleged an earlier judgment was void because the federal district court opinion failed to prove diversity. *See id* (citing *McCormick v. Sullivant,* 23 U.S. 192 (1825)). The Court quoted the *McCormick* opinion as stating that ' "[i]f the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." ' *Chicot County,* 308 U.S. at 376 (quoting *McCormick* 23 U.S. at 199).

The First Circuit has had opportunity to further clarify the distinction between erroneous judgments (which may be attacked only under direct review) and void judgment (which

may be attack collaterally as well) . *See Lubben v. Selective Service System Local Bd. No. 27,* 453 F.2d 645 (1st Cir. 1972). The court explained:

> A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. In the interests of finality, the concept of void judgments is narrowly construed. While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void. Only in the rare instance of a clear usurpation of power will a judgment be rendered void.

See id. at 649 (footnotes omitted). Because this court's exercise of jurisdiction over the plaintiff's action was not a clear usurpation of power, a collateral attack against the judgment will not stand.

The Tenth Circuit has stated that " 'diversity of citizenship is but a quasi-jurisdictional fact. A judgment based upon an erroneous finding of diversity is not void and is immune from collateral attack.' " *Depex Reina 9 Partnership v. Texas International Petroleum Corp.,* 897 F.2d 461, 463-64 (10th Cir. 1990) (quoting *Green v. Hale,* 433 F.2d 324, 330 n.14 (5th Cir. 1970) (citation omitted)). Diversity jurisdiction "rests on statutory interpretation, not constitutional command." *Ruhrgas AG v. Marathon Oil Co,* ____ U.S. ____, ____, 119 S. Ct. 1563, 1570 (1999). If a federal court exercises jurisdiction on the erroneous assumption of diversity jurisdiction, 28 U.S.C. § 1332 is offended, not the Constitution. *See id.* Thus, assuming this court was without jurisdiction under the diversity statute, its exercise (and the Tenth Circuit's exercise) of jurisdiction was a mere erroneous interpretation of 28 U.S.C. § 1332, not a clear usurpation of constitutionally granted authority. The erroneous implicit findings of this court and the Tenth Circuit were therefore only open to direct attacks, not the

collateral attacks, such as the one the plaintiff is attempting in her Rule 60(b)(4) motion. *Cf. Depex Reina,* 897 F.2d at 463-64 (allowing direct attack on erroneous judgment based on incomplete diversity). *See also Nemaizer v. Baker,* 793 F.2d 58, 65 (2nd Cir. 1986) ("Contrary case law and commentators' views permitting any collateral attack on a prior judgment under Rule 60(b)(4) always involve a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction.") (citations omitted).

IV. DIRECT VERSUS COLLATERAL ATTACKS

Because plaintiff proceeded through the complete appellate process, including a denial of her writ of certiorari from the United States Supreme Court, this court's judgment dismissing her case for *forum non conveniens* became final, in the fullest sense of the word, and plaintiff's subsequent motion is an impermissible collateral attack on the judgment. Plaintiff, in her memorandum in support of her motion, and defendants, in their reply memoranda, spend much time debating the procedural posture of Tenth Circuit precedent concerning Rule 60 (b) (4) motions. Admittedly, the Tenth Circuit (and other circuit courts of appeal) opinions cited by the parties lack a bright line test and use interchangeably the terms "final judgment" and "final decision," blurring the line even further. What can be gleaned from these opinions, however, is that for an attack to be one considered "direct," the action in which the judgment at issue was rendered must still be *pending. See Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation,* 673 F.2d 315, 318 (10th Cir. 1982) (citing 1 *Moore's Federal Practice* ¶ 0.60[4] (2nd ed. 1981) ("So long as a case is pending, the issue of federal court jurisdiction may be raised at any stage of the proceedings either by the parties or by the court on its own motion.") As will be explained below, this court's finding that plaintiff's motion is a collateral attack and Judge Lungstrum's opinion in *SBKS Service Corporation v. 1111 Prospect Partners, L.P.,* No. 95-2540-JWL, 1998 WL 928408, at *4 (D. Kan., Oct. 30, 1998) are fully aligned with the Tenth Circuit's previous opinions.

In *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818 (10th Cir. 1981), the Tenth Circuit stated that "the jurisdiction of a court over subject matter may be raised at any point in the proceeding." *Id.* at 822 (citations omitted). Following this statement of the law, to the Tenth Circuit has three times allowed subject matter jurisdiction to be questioned following appeal. *See Wilmer v. Board of County Commissioners*, 69 F.3d 406, 409-10 (10th Cir. 1995); *Depex Reina 9 Partnership v. Texas International Petroleum Corporation*, 897 F.2d 461, 464 (10th Cir. 1990); *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). What distinguishes the Procedural posture of *Wilmer, Depex Reina* and *Ramey* from the instant action is that in those three cases the appellate court had *remanded* the case to the district court and *then* the district court considered subject matter jurisdiction pursuant to a Rule 60(b)(4) motion.[2]

By contrast, in the instant action, the Tenth Circuit *affirmed* this court's dismissal of the case. The Tenth Circuit *denied* plaintiff's motion for rehearing. The United States Supreme Court *denied* plaintiff's petition for writ of certiorari. Unlike the cases mentioned above, the case was never remanded to the district court and at this point the case is no

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2. While arguing the procedural posture of *Wilmer*, plaintiff confuses the terms "final judgment" and "final decision" (albeit cited opinions have used the terms interchangeably making the distinction difficult to discern). A "final decision" rendered by the district court provides the appellate court with jurisdiction under 28 U.S.C. § 1291, but such a final decision does not prevent a direct attack on subject matter jurisdiction because the case is still pending. *See Depex Reina*, 897 F.2d at 464 ("[B]y remanding the case to the district court, we did not create a final judgment. Rather, under 28 U.S.C. § 1291, we reviewed and reversed the final decision of the district court and the issue of jurisdiction was still alive."). A "final judgment," by contrast, is the threshold point, at issue for purposes of this opinion, in which an attack on subject matter jurisdiction becomes collateral and thus impermissible for erroneous judgments. *See id. See generally, Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 159 (7th Cir. 1995) (discussing different meanings of "finality"). Plaintiff's cited authority, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), (Doc. 150 at 4), discusses "final decisions" for purposes of 28 U.S.C. § 1291 and is therefore not on point.

longer pending.[3] "The denial of certiorari is a red herring. It marks the end of the appellate process and so, if the judgment from which certiorari was sought were itself a final judgment . . . it establishes finality in a strong sense." *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995).

Plaintiff argues that because the Rule 60(b)(4) motion was filed in the same district court under the same case number as the judgment being attacked, the effect of the denial of the writ of certiorari is somehow vitiated and the case magically becomes pending once again. The court disagrees that the case number under which a plaintiff chooses to file his Rule 60 (b) (4) motion determines the character of the attack. Rather, the timing of the motion in relation to the direct appeal of the case is the determinative factor. It is this timing which distinguishes *Wilber, Depex Reina,* and *Ramey,* from the instant case and *SBKC Service Corp. v. 1111 Prospect Partners, L.P.,* No. 95-2540-JWL, 1998 WL 928408 (D. Kan., Oct. 30, 1998). In both this case and in *SBKC,* the appellate process had been exhausted before the plaintiff moved the district court to void the judgment. *See SBKC,* 1998 WL 928408, at *1. A Rule 60(b)(4) motion is not to be used as a substitute for the appellate process. *See Kocher v. Dow Chemical Co.,* 132 F.3d 1225, 1229 (8th Cir. 1997). It follows that a Rule 60(b)(4) motion, therefore, cannot be used by plaintiff who did not succeed on her argument concerning subject matter jurisdiction during the appellate process.[4] Plaintiff should have

3. Indeed, because the case, after appeal, was never remanded to the district court, the court contemplates whether it even has jurisdiction at this point to consider whether it ever had jurisdiction at all. *See Lancaster v. Independent School District No. 5,* 149 F.3d 1228, 1237 (10th Cir. 1998) ("[F]iling notice of appeal generally divests the district court of jurisdiction over the issues on appeal . .") . See also *Gould v. Mutual Life Ins. Co. of New York,* 790 F.2d 769, 772 (9th Cir. 1986) (stating that district court does not have jurisdiction to consider Rule 60(b)(motion after appeal in the absence of remand).

4. The fact that plaintiff finally mentioned the possible lack of subject matter jurisdiction *after* the Tenth Circuit affirmed and on a motion for rehearing (which the Tenth Circuit denied without opinion), does not provide plaintiff with an exception to the doctrine of res judicata. *See Gould v. Mutual Life Ins. Co. of New York,* 790 F.2d 769, 771, 774-75 (9th Cir. 1986) (denying plaintiff's Rule 60(b)(4) motion after plaintiff first brought up lack of subject matter jurisdiction in motion for rehearing to appellate court).

argued the lack of diversity jurisdiction to this court before it dismissed her case. Plaintiff should have argued the lack of diversity jurisdiction in her original appeal to the Tenth Circuit or at oral argument. For whatever reason, both the Tenth Circuit, on plaintiff's motion for rehearing, and the United States Supreme Court, on plaintiff's petition for writ of certiorari, affirmed this court's dismissal of plaintiff's case without mentioning plaintiff's argument. In so doing, the Supreme Court rendered plaintiff's case final for purposes of res judicata. Her subsequent attack on this court's judgment is thus deemed collateral and will not be considered.

Simply put, plaintiff missed the chance to catch a ride on the appellate courts' boat to the land of reversal and remand. She cannot now run back to the dock and ask this court to row her across. The court might have been able to do so three years ago. Now the court's oars are mired in the doctrine of res judicata. The court's judgment stands.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140) is DENIED.

IT IS SO ORDERED.

Dated this 4th day of October 1999, at Wichita, Kansas.

Monti Belot

Monti L. Belot
UNITED STATES DISTRICT JUDGE

STATUTES AND RULE INVOLVED

28 U.S.C. § 1332(a) provides in pertinent part as follows:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Rule 60. Relief from Judgment or Order

Rule 60(b)(4) provides in pertinent part as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

. . . .

(4) the judgment is void;

. . . .

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit

the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.